

Message Text

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TO USMISSION USBERLIN IMMEDIATE
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C O N F I D E N T I A L STATE 247518

E.O. 11652:GDS

TAGS:PINS, BQG, WB, PL

SUBJECT:U.S. COURT FOR BERLIN

R?F: STATE 243383

1. SUMMARY - THIS MESSAGE OUTLINES THE STEPS BEING
TAKEN IN WASHINGTON TO CONSTITUTE THE U.S. COURT FOR
BERLIN, AND POSES A NUMBER OF LEGAL AND LOGISTICAL QUES-
TIONS FOR USBERLIN'S ANALYSIS AND PROMPT COMMENT.

2. CONSTITUTING THE COURT INVOLVES TWO MAJOR CONSIDERA-
TIONS: PERSONNEL AND PROCEDURES. WE ARE SEEKING TO
IDENTIFY A PERSON AVAILABLE TO ACT AS A JUDGE ON SHORT
NOTICE. WE ANTICIPATE THAT ANY JUDGE WOULD RECEIVE
BRIEFINGS AND REVIEW RULES OF PROCEDURE IN WASHINGTON,
AND THEN FLY TO BERLIN TO PROMULGATE RULES AND PRESIDE
OVER INITIAL ARREST PROCEEDINGS. JUDGE MIGHT THEN
RETURN TO BERLIN PERIODICALLY AS REQUIRED FOR FURTHER
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PRETRIAL PROCEEDINGS AND ACTUAL TRIAL.

3. PROSECUTORS - WE HAVE NOT YET RESOLVED LIKELY COM-
POSITION OF PROSECUTION TEAM; IDEALLY, TEAM COULD INCLUDE
U.S. PROSECUTOR FAMILIAR WITH FEDERAL RULES AND JAG
PERSONNEL FAMILIAR WITH LOCAL SITUATION. USBER COMMENTS
WELCOME. WE ANTICIPATE THAT USBER LEGAL ADVISER WILL

PROVIDE BROAD POLICY GUIDANCE TO PROSECUTION TEAM IN HIS ROLE AS U.S. ATTORNEY FOR BERLIN, BUT THAT LEGAL ADVISER WILL NOT BECOME INVOLVED IN DAY TO DAY PREPARATIONS FOR, OR CONDUCT OF, THE PROSECUTION.

4. RULES OF PROCEDURE - WE HAVE DRAFTED DETAILED RULES OF PROCEDURE MODELED ON THE FEDERAL RULES OF CRIMINAL PROCEDURE. THESE ARE BEING REVIEWED BY JUSTICE, AND COPY HAS BEEN POUCHED TO SURENA FOR REVIEW AND COMMENT.

5. TIMING - WE FULLY UNDERSTAND THE NEED FOR PROMPT ACTION, BUT WE CANNOT NOW LAY DOWN A PROPOSED TIME SCHEDULE.

6. WE ARE TRYING TO ANTICIPATE (AND IF POSSIBLE, TO TAKE CARE OF) LEGAL AND LOGISTICAL PROBLEMS. ACCORDINGLY, USBER REQUESTED TO CONSIDER AND PROVIDE RESPONSES TO THE FOLLOWING QUESTIONS.

A. LAW NO. 46 - IS LAW NO. 46 IN FACT IN FORCE AND A SUFFICIENT LEGAL BASIS FOR EXERCISING CRIMINAL JURISDICTION? (THIS IS A SERIOUS QUESTION; JURISDICTIONAL CHALLENGES WILL COME AT TRIAL OR SUBSEQUENTLY.)

B. WHAT WOULD BE REQUIRED TO AMEND LAW NO. 46? ARE ANY AMENDMENTS NECESSARY OR DESIRABLE?
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C. IS THERE A CLERK-MARSHALL FOR THE COURT? IF NOT, WHO SHOULD BE APPOINTED?

D. SHOULD MEMBERS OF PROSECUTING TEAM BE DESIGNATED AS ASSISTANT U.S. ATTORNEYS? IF SO, WOULD THIS REQUIRE AMENDMENT TO ARTICLE 2(2)?

E. HAS U.S. ATTORNEY TAKEN THE OATH REQUIRED BY ARTICLE 2(4)?

F. HAVE LETTERS OF APPOINTMENT OR OTHER FORMAL DOCUMENTS BEEN ISSUED UNDER ARTICLE 2(4)? DOES U.S. ATTORNEY HAVE EVIDENCE OF HIS APPOINTMENT?

G. ARTICLE 3(1) OF LAW 46 IMPLIES THAT PROCEEDINGS WOULD BE GOVERNED BY GERMAN SUBSTANTIVE LAW AS PART OF LEGISLATION IN EFFECT IN THE U.S. SECTOR. PLEASE IDENTIFY THE PROVISIONS OF GERMAN LAW WHICH THE COURT WOULD BE OBLIGED TO FOLLOW. WE ARE ASSUMING THAT THE DIVISION BETWEEN SUBSTANTIVE MATTERS GOVERNED BY LOCAL LAW AND PROCEDURAL QUESTIONS WOULD BE DETERMINED IN ACCORDANCE WITH

U.S. PRINCIPLES. IS THIS REASONABLE ASSUMPTION? OR ARE THERE GREY AREAS (E.G., BAIL) WHICH WE WOULD VIEW AS PROCEDURAL BUT WHICH UNDER GERMAN LAW ARE PART OF THE SUBSTANTIVE FRAMEWORK CREATING THE OFFENSE? WHAT ARE THE SPECIFIC STEPS BY WHICH APPLICABLE PROVISIONS OF GERMAN AND ALLIED LAW HAVE COME INTO EFFECT IN THE U.S. SECTOR?

H. PLEASE PROVIDE TRANSLATIONS OF RELEVANT SUBSTANTIVE CRIMINAL PROVISIONS, AND ANALYSIS OF ELEMENTS OF OFFENSE (CRIMINAL INTENT, ETC.) UNDER APPLICABLE LAW. IN SHORT, WHAT DO THE PROSECUTORS HAVE TO PROVE.

I. WOULD OFFENSES DESCRIBED ABOVE COMPLY WITH 19 OCTOBER 1955 AMENDMENT TO ARTICLE 3(1), WHICH REQUIRES THAT THE CONFIDENTIAL

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OFFENSE BE "COMMITTED WITHIN THE AREA OF GREATER BERLIN". (WE ARE CONCERNED ABOUT POSSIBLE DEFENSE CLAIM THAT ACTUAL OFFENSE OF THREAT, COERCION OR WHATEVER OCCURRED ELSEWHERE. IS THIS A CONCEIVABLE CLAIM UNDER APPLICABLE GERMAN LAW?)

J. WHAT ARGUMENTS ARE AVAILABLE TO THE DEFENSE UNDER GERMAN LAW (INSANITY, DURESS, MOTIVE, ETC.1.

K. WHAT IS THE AUTHORIZED RANGE OF PENALTIES (ARTICLE 3 (3) FOR THE SUBSTANTIVE OFFENSES INVOLVED AND WHAT PENALTY WOULD A GERMAN COURT BE LIKELY TO IMPOSE? ASSUMING A CONVICTION, HOW WOULD WE HANDLE SERVICE OF SENTENCE, PROBATION, ETC.? WHAT LEGAL STEPS WOULD BE REQUIRED TO TURN DEFENDANTS OVER TO BERLINERS FOR SERVICE OF SENTENCE?

L. PROPOSED RULES HAVE ADOPTED WHOLESALE THE FEDERAL RULES PROVISIONS ON CONTEMPT, SUBPOENAS, DEPOSITIONS. DO YOU SEE ANY PROBLEM?

M. UNDER ARTICLE 3(5), COURT MAY ESTABLISH RULES OF PRACTICE AND PROCEDURE "CONSISTENTLY WITH APPLICABLE LEGISLATION". WHAT LEGISLATION? IF THIS MEANS LEGISLATION IN FORCE IN BERLIN, WHAT RESTRICTIONS WOULD THERE BE?

N. WHAT STANDARDS (U.S.? GERMAN? AD HOC?) SHOULD APPLY TO BAIL? WOULD A DEFENDANT IN A GERMAN COURT UNDER THESE CIRCUMSTANCES BE ELIGIBLE FOR BAIL OR OTHER FORM OF PRETRIAL RELEASE? SHOULD WE ADDRESS BAIL/PRETRIAL RELEASE IN RULES OF PROCEDURE?

O. WHAT MEASURES MUST U.S. TAKE, IF ANY, TO EXERCISE JURISDICTION OVER CASE AS AGAINST THE BERLINERS? DO CONFIDENTIAL

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WE NEED TO TAKE ANY ACTION TO RETRIEVE CRIMINAL JURISDICTION?

7. FOLOWING MATTERS ARE MORE LOGISTICAL; USBER SHOULD BEGIN TO MAKE ARRANGEMENTS FOR THESE AS BEST IT CAN WITHOUT FIRM DATES. FOR PLANNING PURPOSES, FORMAL PROCEEDINGS WILL PROBABLY INVOLVE FOUR OR MORE SEPARATE PHASES: A BRIEF (1-2 DAY) INITIAL SESSION AT WHICH DEFENDANTS ARE CHARGED; A POSSIBLE SUBSEQUENT (PERHAPS 3 DAY) PRELIMINARY HEARING OR AN ARRAINGMENT; A SESSION TO CONSIDER PRETRIAL MOTIONS (3-4 DAYS) AND THE ACTUAL TRIAL (ONE WEEK). (FOREGOING ESTIMATES ARE HIGHLY TENTATIVE.)

A. COURT ROOM, JUDGES' CHAMBERS - PROCEEDINGS WILL REQUIRE A SUITABLY FURNISHED, SECURE, PREFERABLY LARGE AND DIGNIFIED COURT ROOM APPROPRIATELY EQUIPPED FOR GERMAN-ENGLISH INTERPRETATION. JUDGE WILL REQUIRE CHAMBERS REASONABLY PROXIMATE TO COURT ROOM.

B. LAW LIBRARY - BOTH JUDGE AND PROSECUTORS WILL REQUIRE ACCESS TO WHATEVER LAW LIBRARY FACILITIES ARE AVAILABLE. WHAT U.S.-ENGLISH LANGUAGE LEGAL MATERIALS (IF ANY) ARE AVAILABLE IN BERLIN?

C. PROSECUTION TEAM WILL REQUIRE OFFICES, SUPPORT STAFF, ETC.

D. COURT REPORTERS - ALL PROCEEDINGS WILL BE ON THE RECORD AND TRANSCRIPTS (PREFERABLY BILINGUAL) WILL BE REQUIRED.

E. GERMAN LEGAL ASSISTANTS - BOTH JUDGE AND PROSECUTORS WILL LIKELY REQUIRE THE ASSISTANCE OF (DIFFERENT) BILINGUAL GERMAN LAW EXPERTS COMPETENT TO ADVISE ON QUESTIONS OF GERMAN LAW. COULD THESE BE BERLIN OR
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GERMAN PROSECUTING OFFICIALS, AND IF SO, UNDER WHAT TYPE OF ARRANGEMENT? USBER SHOULD ALSO CONSIDER FEASIBILITY OR DESIRABILITY OF SOME TYPE OF ADVISORY PROCEDURE UNDER WHICH CLEARLY FRAMED QUESTIONS OF GERMAN LAW COULD BE REFERRED TO THE GERMANS FOR RESPONSE.

F. INTERPRETERS - IF DEFENDANTS ARE NOT COMPETENT IN

ENGLISH (WHICH WE ASSUME TO BE THE CASE), INTERPRETATION
WILL BE REQUIRED AT ALL PROCEEDINGS. TRANSLATIONS
MAY ALSO BE REQUIRED FOR COURT PAPERS, BRIEFS, ETC.,
DEPENDING ON DEFENSE COUNSEL.

G. DEFENSE COUNSEL - WE ASSUME THAT DEFENDANTS WILL
RETAIN OWN COUNSEL, ALTHOUGH WE MAY HAVE TO PROVIDE
FUNDING. IS USBER ABLE TO RECOMMEND COMPETENT
COUNSEL IF NEED ARISES? CHRISTOPHER

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